

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PENNY J. GLEASON
Claimant

VS.

SAMARITAN HOME
Respondent

AND

CHURCH MUTUAL INSURANCE COMPANY
Insurance Carrier

Docket No. 157,564

ORDER

ON the 17th day of February, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey dated January 7, 1994, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through her attorney, Steven Hornbaker of Junction City, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Matthew S. Crowley of Topeka, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Special Administrative Law Judge dated January 7, 1994.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth

in the Award of the Special Administrative Law Judge dated January 7, 1994.

ISSUES

- (1) What is the nature and extent of claimant's disability, if any?
- (2) Is claimant entitled to additional temporary total disability compensation, medical treatment and future medical treatment?
- (3) Is claimant entitled to vocational rehabilitation?
- (4) Is respondent entitled to reimbursement for overpayment of temporary total disability and/or medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The claimant, Penny J. Gleason, sustained personal injury by accident arising out of and in the course of her employment with the respondent but has failed to prove by a preponderance of the credible evidence that her ongoing physical and psychological problems are the result of the work related injury suffered with respondent on September 20, 1989.

The claimant, an LPN, was working at the Samaritan Home on the date of injury. While waiting for the patients to come to breakfast, a patient walked up to claimant and hit her on the right shoulder causing her shoulder to go back. Claimant experienced no initial pain and according to Dr. Glenn O. Bair, the company doctor, no contusion was ever visible on the claimant to indicate that she had been struck.

Claimant contacted Dr. Bair and obtained a prescription for Ibuprofen and a muscle relaxant even though she experienced no initial pain. Later, when claimant developed a dull ache down the back of her arm from her shoulder to the back of her right hand, she was taken off work for three days by Dr. Bair, who also prescribed additional medication. Claimant never returned to work for the respondent subsequent to this incident. Claimant was first referred to Dr. Vinod Patel and ultimately received treatment from Dr. Yoon, Dr. Yorke, Dr. Lang, Dr. Hansen, Dr. Wolfe, Dr. Shapiro and Dr. Phillips.

The claimant's pain began in the right shoulder and right arm, moved to the right side of her neck into the right hand, and migrated into the left shoulder and left arm. Claimant later developed problems in her hips causing her difficulty in bearing weight on her right leg, her hands developed a coldness tendency, she developed vision problems with blurring and black floating spots in front of her eyes, suffered shaking and trembling of the hands, and lost control of her bladder. She has, at various times, been on Flexoril, Ibuprofen, Darvocet 100, Prozac, Sinequan, and Anaspaz.

Claimant has undergone several sessions of physical therapy, pain management, stretching exercises, multiple cervical nerve blocks, and has continued on a regiment of multiple medications almost continually since the date of the injury. None of the treatment and none of the medications have resulted in the elimination of claimant's ongoing pain

complaints.

The record is saturated with testimony from various sources regarding claimant's background, dysfunctional family life, history of abuse, ongoing controversies with various members of her family, and a multitude of allegations and counter-allegations between claimant and various members of claimant's family.

Claimant has a history of ulcers, drug addiction, was in the Beloit Girls School for three years and spent eight to nine months at the Topeka State Hospital. She is also described as having suicidal tendencies and has been diagnosed at various times with post-traumatic fibromyalgia, congenital disturbances including stuttering, substantial tremulous, rapid alternating movements of the left arm, possible reflex or sympathetic dystrophy, chronic pain syndrome, borderline hysteria and was ultimately diagnosed as having a borderline personality disorder.

While a multitude of doctors had the opportunity to examine, test and treat claimant only three were deposed and the records of Dr. Glenn O. Bair, Dr. Warren G. Phillips, and Dr. Frederick Wolfe are the only records which can be considered by the Appeals Board. (K.S.A. 44-519)

Dr. Bair, who initially treated claimant and has continued to treat her since the injury, prescribed the medication being utilized by claimant throughout the litigation of this incident. Dr. Bair opined that claimant probably did sustain an injury on September 20, 1989, and diagnosed post-traumatic fibromyalgia syndrome subsequent to the claimant obtaining medical information from fibromyalgia experts in 1991.

At Dr. Bair's request, claimant was examined by Dr. Frederick Wolfe, a fibromyalgia internal medicine specialist, on May 17, 1991, and again on June 11, 1992. During the first examination Dr. Wolfe found claimant to have a post-traumatic fibromyalgia syndrome stemming from the incident on September 20, 1989. Claimant had 11 positive trigger points out of a possible 18 connected with fibromyalgia. Dr. Wolfe felt that, while no one is able to draw any direct causal link between trauma and the development of fibromyalgia, he has seen it often enough to believe that there is a link between the two. He felt medicine simply did not know enough about this syndrome to understand the actual causes of the problem.

Dr. Wolfe further testified that people with chronic pain disorders generally have psychological difficulties. He expressed concern that people involved in litigation and compensation generally have no reason to want to get better until the litigation is settled.

Claimant was referred back to Dr. Wolfe on June 11, 1992, apparently as a result of a fall she suffered when her leg gave out. During that examination the claimant walked around, jumped up and down and moved without noticeable difficulty. Dr. Wolfe found only a single positive trigger point during this examination. At the time of the second examination Dr. Wolfe felt that the claimant did not meet the criteria for ongoing fibromyalgia. When asked specifically whether or not the fibromyalgia occurred as a result of the injury, he answered, "It would not surprise me if it did, but I can not tell you that, no." Dr. Wolfe, who has handled between 600 and 800 fibromyalgia cases, finds it significant that most cases involving fibromyalgia include people in ongoing litigation. His only recommendation, other than removing the claimant from all medication, would be to refer the claimant to a good quality pain clinic with psychological and other types of therapies after which he would push her out the door and tell her, "It is your time to fly." He felt that it would be better for claimant if she were to return to work and felt she was capable of working.

Claimant was examined by Dr. Warren G. Phillips, a board certified psychiatrist, who found claimant to be from a dysfunctional family. He diagnosed claimant as having a personality disorder including hysteria and a poor self-image, and described her multitude of physical complaints as being her attempt to cope with her tremendous insecurity and frustration. He opined that the claimant's ongoing chronic pain symptoms would not go away until claimant was taken completely off the medication as medication perpetuates the problem. When asked about the causal relationship between the September 20, 1989, injury and her ongoing problems he testified that the incident in September 1989, was only incidental to the problem and had nothing to do with causing claimant's ongoing problems. He opined that anything could have precipitated this pattern as claimant could have developed this problem running into a door, stepping out of a car, or stumbling. He diagnosed claimant as having a personality disorder, borderline hysterical and felt she was susceptible to these symptoms irrelevant of physical trauma. He further opined that the claimant has no physical impairment from the September 20, 1989, incident. Her only impairment is from her psychiatric problems. He did not believe the claimant has a chronic pain syndrome, fibromyalgia or any other type of "itis", but believed she had a borderline personality disorder. He did not believe the injury caused what was happening because the problems she was experiencing would have happened any way in some form.

When provided the report of Dr. Phillips, Dr. Wolfe opined that Dr. Phillips' report appeared to be very accurate, interesting and compelling. Both Dr. Phillips and Dr. Wolfe felt claimant should be encouraged to return to work.

K.S.A. 44-501(a) states in part:

"If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines the burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all the various conditions upon which her right to it depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

The Appeals Board finds that while claimant has proven a temporary fibromyalgia condition arising out of and in the course of her employment on September 20, 1989, claimant has failed to prove by a preponderance of the credible evidence that she suffered any permanent functional impairment or any ongoing permanent work disability as a result of this incident.

K.S.A. 44-510e(a) defines functional impairment as being:

"...the extent, expressed as a percentage, of the total loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

There is no medical evidence in the record to indicate that claimant suffered any functional impairment as a result of this injury. Dr. Bair found no outward marks of any kind to indicate claimant had suffered any type of bruise or contusion. Dr. Wolfe, who originally diagnosed fibromyalgia, was unable to find support for this diagnosis during his June 11, 1992, examination of claimant. As such the Appeals Board finds that based upon the entire record claimant has no functional impairment as a result of the incident of September 20, 1989.

K.S.A. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment."

Dr. Bair opined that claimant was 100 percent (100%) disabled due to her ongoing symptomatology. The Appeals Board, as the trier of facts, must decide which testimony is more accurate and/or credible. Dr. Phillips and Dr. Wolfe both agreed it would be in the claimant's best interest to return to work. The Appeals Board finds the testimony of Dr. Phillips and Dr. Wolfe to be the more credible testimony and the testimony of Dr. Bair to be less credible and somewhat improbable. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The only evidence regarding the claimant's ability to obtain work in the open labor market and to earn a comparable wage is that of Mr. Monty Longacre. Mr. Longacre found claimant to be 100 percent (100%) restricted in her ability to earn a comparable wage and in her ability to perform work in the open labor market. Mr. Longacre's opinion is based upon the medical reports of Dr. Glenn O. Bair, which the Appeals Board has found less than credible, and upon the reports of Dr. John Wertzberger, whose medical records were never placed into evidence. (K.S.A. 44-519) As such, the opinion of Mr. Longacre will not be considered credible as Mr. Longacre was not provided the medical records of Dr. Phillips or Dr. Wolfe in reaching his opinion regarding claimant's work disability. The opinions of Dr. Phillips and Dr. Wolfe that it would be in the claimant's best interest to return to the labor force contain medical information that should have been considered by Mr. Longacre in developing his opinion as to claimant's limitations.

The Appeals Board finds claimant has failed to prove by a preponderance of the credible evidence that she suffered any work disability as a result of the incident on September 20, 1989.

Claimant does allege entitlement to an award as a result of psychological post-traumatic neuroses from the injury of September 20, 1989. The claimant cites Love v. McDonald's Restaurant, 13 Kan. App. 2d 397, 771 P.2d 557 (1989) in support of her contentions. The law in this regard is well set out. Traumatic neurosis, followed and

directly traceable to a work related physical injury, is compensable. Id. at 401.

The Appellate Court has held that functional impairment may be either physical or psychological. They have also reasoned that disability from a psychological impairment may be less than total. Adamson v. Davis Moore Datsun, Inc. and United States Fidelity & Guaranty Company, No. 69,399 (Ks. Ct. App. 1994). Nevertheless, in order to find either functional impairment or permanent partial general disability, credible evidence must be presented to prove claimant's loss. As the more credible evidence shows that claimant has suffered neither permanent functional impairment nor a work disability, claimant is not entitled to additional award in this matter.

The Appeals Board hereby finds that claimant has failed in her burden of proving by a preponderance of the credible evidence that she suffered either a functional impairment or a permanent partial general disability as a result of the injury of September 20, 1989.

AWARD

(1) **WHEREFORE**, it is the finding, decision and order of the Appeals Board that the claimant, Penny J. Gleason, shall be and is herein entitled to 115.54 weeks of temporary total compensation at \$249.03 per week in the sum of \$28,773.45. Claimant is denied additional permanent partial disability compensation stemming from the September 20, 1989, injury.

(2) The Appeals Board finds claimant is entitled to no additional temporary total disability compensation but is entitled to future medical treatment upon application to and approval by the Director.

(3) Claimant is denied vocational rehabilitation.

(4) The respondent is denied reimbursement for any overpayment of temporary total disability and/or medical benefits.

As of March 16, 1994, there would be due and owing to the claimant 115.54 weeks of temporary total disability compensation at the rate of \$249.03 per week in the sum of \$28,773.45 which is ordered paid in one lump sum less any monies previously paid.

The Appeals Board finds that claimant's contract of employment with her attorney is hereby approved pursuant to K.S.A. 44-536.

Fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and insurance carrier as follows:

OWENS BRAKE & ASSOCIATES

Deposition of Glenn O. Bair, M.D.	Unknown
Deposition of Monty Longacre	\$ 468.20
Deposition of Robert James Way	\$ 220.90
Deposition of Wendell Gleason	Unknown

APPINO & ACHTEN REPORTING SERVICE

Deposition of Debbie Richmond	\$ 113.75
Deposition of Warren G. Phillips, M.D.	\$ 180.90
Continuation of Regular Hearing,	

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Deposition of Penny J. Gleason	\$ 186.50
Preliminary Hearing Transcript, Dated February 25, 1992	\$ 213.80

BARBER & ASSOCIATES	
Deposition of Frederick Wolfe, M.D.	\$ 384.80

CORNELL REPORTING SERVICE	
Transcript of Regular Hearing, Dated August 17, 1992	\$ 202.40

NORA LYON & ASSOCIATES, INC.	
Preliminary Hearing Transcript, Dated October 8, 1991	\$ 312.90

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Steven Hornbaker, 715 North Washington, Junction City, Kansas 66441-0168
Matthew S. Crowley, PO Box 4306, Topeka, Kansas 66604-0306
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director